Digital Tempo Sdn Bhd v Pengangkutan Awam Putrajaya Travel & Tours Sdn Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22NCC-16–01 OF 2020
TEE GEOK HOCK JC
14 AUGUST 2020

Civil Procedure — Injunction — Interim injunction — Whether plaintiff had satisfied all conditions for grant of interim injunction to maintain status quo until suit between parties was determined — Whether plaintiff's claim showed serious arguable and triable issues — Whether balance of convenience favoured grant of injunction as plaintiff stood to suffer loss and injustice if injunction was refused whereas defendant would not suffer any loss if status quo was maintained

The defendant appointed the plaintiff to implement the 'Parkbyphone' e-payment system of parking in the administrative capital of Putrajaya for a term of three years beginning 6 February 2017 with an option to extend the appointment period by another two years on the same terms and conditions. In early January 2020, the plaintiff informed the defendant that it would exercise the option to continue with the appointment for another two years but the defendant replied that it was terminating the appointment because there were numerous complaints from users about the efficacy of the parking system. The defendant further told the plaintiff to dismantle and remove all its parking system equipment and hand over possession of the parking sites to the defendant failing which it would proceed to re-take possession of the parking sites and would not be liable for any loss or damage caused to the plaintiff's equipment. The plaintiff promptly filed the instant suit for, inter alia: (a) an interim injunction to restrain the defendant from evicting the plaintiff or removing its parking system and equipment from the parking sites and from collecting the parking revenues therefrom; (b) a declaration that the defendant had prematurely and wrongfully terminated the contract; and (c) damages. On the plaintiff's application, the court granted an ex parte interim injunction to maintain the status quo until the suit was disposed of and fixed a date for the ex parte injunction application to be heard inter partes. The defendant, meanwhile, applied vide encl 12 to set aside the ex parte injunction on the ground that: (i) the plaintiff had not pleaded for specific performance of the option clause in the contract to extend the appointment period and argued that as a result there was no cause of action for which the injunction could provide ancillary relief; and (ii) the plaintiff had not disclosed material facts when applying for the ex parte injunction.

Held, dismissing encl 12 and granting the inter partes interim injunction on

the terms that: (a) the defendant was at liberty to apply to discharge the injunction if the plaintiff failed to proceed diligently with the trial of the suit or defaulted in paying the defendant its share of the parking proceeds; and (b) such payment of the proceeds to the defendant was without prejudice to the defendant's right to contend that the contract between the parties had expired:

(1) The plaintiff's statement of claim had pleaded sufficient facts and materials which disclosed a reasonable cause of action for the grant of an interlocutory injunction, declaration and damages. The plaintiff's claim also disclosed serious arguable or triable issues that required further investigation by the court and the balance of convenience favoured the grant of the injunction to maintain the status quo pending the disposal of the suit (see paras 27, 34 & 58).

(2) There was no rigid rule of law that required that to be eligible for the grant of an interlocutory injunction a plaintiff must have pleaded a particular type of cause of action or, if it was an action based on contract, that the plaintiff must have pleaded the claims for declaration plus specific performance (see para 56).

(3) The plaintiff had disclosed all material facts when applying for the ex parte interlocutory injunction and there was nothing in the evidence to support any allegation that it had deliberately not disclosed any material fact with intent to misrepresent (see para 67).

(4) The balance of convenience favoured the grant of the interim injunction. If the injunction was not granted, the plaintiff stood to suffer much greater harm and injustice as it had invested substantial sums of money to install the new parking system such that any eviction of the plaintiff and removal of its equipment would cause it substantial loss and damages. The defendant, on the other hand, had not adduced any evidence of likely loss that it would suffer if the status quo was preserved pending the final outcome of the instant suit. Furthermore, the defendant would continue to receive from the plaintiff its share of income from the car parking operations if the status quo was maintained (see paras 78–82).

(5) In granting the interim injunction, the court noted that the plaintiff had not been guilty of any delay in applying for the relief and that the defendant had not only failed to show that monetary compensation would adequately compensate the plaintiff for all loss and damages it might suffer if the injunction was refused, but the defendant had also failed to show that it had the ability and readiness to provide such monetary compensation if the injunction was not granted (see paras 84–85).

A **[Bahasa Malaysia summary**

Defendan telah melantik plaintif untuk melaksanakan sistem e-pembayaran 'Parkbyphone' tempat letak kenderaan di ibu pentadbiran Putrajaya selama tiga tahun bermula 6 Februari 2017 dengan pilihan untuk melanjutkan tempoh pelantikan selama dua tahun lagi dengan terma dan syarat yang sama. Pada awal Januari 2020, plaintif memaklumkan kepada defendan bahawa pihaknya akan menggunapakai pilihan untuk meneruskan pelantikan selama dua tahun lagi tetapi defendan menjawab bahawa ia akan menamatkan pelantikan tersebut kerana terdapat banyak aduan dari pengguna mengenai keberkesanan sistem tempat letak kenderaan tersebut. Defendan selanjutnya memaklukan kepada plaintif supaya mencabut dan mengalihkan kesemua peralatan sistem tempat letak kenderaan dan menyerahkan pemilikan tempat letak kenderaan kepada defendan yang mana jika gagal ia akan meneruskan untuk mendapatkan kembali tempat letak kenderaan tersebut dan tidak akan bertanggungjawab atas kehilangan atau kerosakan peralatan plaintif. Plaintif segera memfailkan tindakan semasa untuk, antara lain: (a) injunksi interim bagi menghalang defendan daripada mengusir plaintif atau mengalihkan sistem dan peralatan dari tempat letak kenderaan dan dari mengutip hasil parkir daripadanya; (b) satu deklarasi bahawa defendan telah menamatkan kontrak secara pramatang dan salah; dan (c) ganti rugi. Berdasarkan permohonan plaintif, mahkamah memberikan injunksi interim ex parte untuk mengekalkan status quo sehingga tuntutan tersebut dilupuskan dan menetapkan tarikh permohonan injunksi ex parte untuk didengar secara inter partes. Defendan, dalam pada itu, memohon berdasarkan lampiran 12 untuk mengetepikan injunksi ex parte dengan alasan bahawa: (i) plaintif tidak memplidkan untuk pelaksanaan spesifik klausa pilihan dalam kontrak untuk melanjutkan tempoh pelantikan dan berpendapat bahawa sebagai akibatnya tiada kausa tindakan yang mana injuksi tersebut dapat memberikan remedi tambahan; dan (ii) plaintif tidak mendedahkan fakta material apabila memohon injunksi ex parte.

Diputuskan, menolak lampiran 12 dan memberikan injunksi interim inter partes dengan terma bahawa: (a) defendan mempunyai kebebasan untuk memohon untuk melepaskan injunksi tersebut sekiranya plaintif gagal meneruskan perbicaraan tindakan tersebut dengan berhemah atau gagal membayar defendan bahagiannya dari hasil tempat letak kenderaan; dan (b) pembayaran hasil tersebut kepada defendan adalah tanpa memprejudiskan hak defendan untuk menghujahkan bahawa kontrak antara kedua-dua pihak telah tamat:

(1) Pernyataan tuntutan plaintif telah memplidkan fakta dan material yang mencukupi dalam mendedahkan kausa tindakan yang wajar untuk pemberian injunksi, deklarasi dan ganti rugi interlokutori. Tuntutan plaintif juga mendedahkan isu-isu serius yang dapat dihujahkan atau dapat dibicarakan yang memerlukan pemeriksaan lebih lanjut oleh

mahkamah dan imbangan kemudahan memihak kepada pemberian injunksi untuk mengekalkan status quo sementara menunggu pelupusan tindakan tersebut (lihat perenggan 27, 34 & 58).

(2) Tidak ada peraturan undang-undang ketat yang diperlukan dalam membenarkan pemberian injunksi interlokutori, plaintif harus memplidkan suatu jenis kausa tindakan tertentu atau, sekiranya ia adalah tindakan berdasarkan kontrak, maka plaintif harus memplidkan tuntutan untuk satu deklarasi dengan perlaksanaan spesifik (lihat perenggan 56).

(3) Plaintif telah mendedahkan kesemua fakta material apabila mengemukakan permohonan injunksi interlokutori ex parte dan tidak ada bukti yang menyokong dakwaan bahawa ia dengan sengaja tidak mendedahkan fakta material dengan niat untuk memberikan representasi yang salah (lihat perenggan 67).

(4) Imbangan kemudahan memihak kepada pemberian injunksi interim. Sekiranya injunksi tidak diberikan, plaintif akan mengalami kerugian dan ketidakadilan yang jauh lebih besar kerana ia telah mengeluarkan sejumlah besar wang untuk memasang sistem tempat letak kenderaan baru yang mana sebarang pengusiran plaintif dan pengalihan peralatannya akan menyebabkan kerugian dan kerosakan yang besar. Defendan pula, sebaliknya, tidak mengemukakan sebarang bukti kemungkinan kerugian yang akan ditanggungnya sekiranya status quo dikekalkan sementara menunggu keputusan muktamad tuntutan semasa. Selanjutnya, defendan akan terus menerima daripada plaintif bahagiannya hasil dari operasi tempat letak kenderaan sekiranya status quo dikekalkan (lihat perenggan 78–82).

(5) Dalam membenarkan injunksi interim, mahkamah berpendapat bahawa plaintif tidak bersalah atas kelewatan dalam mengemukakan permohonan untuk relif tersebut dan bahawa defendan tidak hanya gagal menunjukkan bahawa pampasan wang akan memberikan pampasan yang mencukupi kepada plaintif atas kesemua kehilangan dan kerugian yang mungkin akan dialaminya sekiranya injunksi tersebut ditolak, tetapi defendan juga gagal menunjukkan bahawa ia memiliki kemampuan dan kesediaan untuk memberikan pampasan wang tersebut sekiranya injunksi tersebut tidak dibenarkan (lihat perenggan 84–85).]

Cases referred to

American Cynamid v Ethicon Ltd [1975] AC 396, HL (refd)

Beaufort International Hotels Ltd v Tanjung Aru Hotel Sdn Bhd v Wah Bee & Co Sdn Bhd Penang High Court Suit No 866 of 1985 (unreported) (distd)

Beufort International Hotels Ltd v Tanjung Aru Hotel Sdn Bhd [1998] 1 CLJ 378, HC (refd)

A *Black Swan Investment LSA v Harvest View Limited* [2010] ECSCJ No 357, HC (refd)
Channel Tunnel Group v Balfour Beatty Ltd [1993] AC 334, HL (refd)
Chief Constable of Kent v V & Anor [1983] QB 34, CA (refd)
Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd [2003] 3 MLJ 321;
B [2003] 3 CLJ 532, CA (refd)
Cookson v Knowles [1979] AC 556, HL (refd)
Creative Furnishing Sdn Bhd v Wong Koi @ Wong Khoon Foh tta Syarikat Sri Jaya [1989] 2 MLJ 153; [1989] 1 CLJ Rep 22; [1989] 2 CLJ 93, SC (refd)
Eastern Properties Sdn Bhd v Hampstead Corporation Sdn Bhd [2007] 6 CLJ
C 538, CA (refd)
Evans v Bartlam [1937] AC 473, HL (refd)
Harris v DPP [1952] 1 All ER 1044, HL (refd)
Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank
D *Malaysia Bhd)* [2018] 2 MLJ 292; [2018] 1 CLJ 415, FC (refd)
JSC Mexdunarodmy Promyshlenniy Bank v Sergei Viktorovich Pugachev [2014] EWHC 4336, ChD (refd)
Joseph Paulus Lantip v Tnio Chee Chang and another appeal [2020] 5 MLJ 708, CA (refd)
E *Kebing Wan & Anor v Lembaga Pembangunan dan Lindungan Tanah & Ors* [2012] MLJU 1284; [2012] 1 LNS 1026, CA (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193; [1995] 1 CLJ 293, CA (refd)
Kenanga Investment Bank Bhd v Swee Joo Berhad & Ors And Another Appeal
F [2017] MLJU 2095; [2017] 1 LNS 2086, CA (refd)
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 316; [2003] 4 CLJ 1, FC (refd)
Low Kwye Ying v Can Yek Ying [1971] 1 MLJ 151 (refd)
Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd
G [2002] 1 MLJ 385; [2002] 1 CLJ 645, FC (refd)
Mercedes-Benz AG v Leiduck [1995] 3 All ER 929, PC (refd)
Muholland v Mitchell [1971] AC 666, HL (refd)
Mutual Life & Citizens' Assurance Company Ltd & Another v Clive Raleigh Evatt [1971] AC 793, PC (refd)
H *NZ New Image Sdn Bhd v Loh Yok Liang* [2016] MLJU 1768; [2016] 9 CLJ 474, CA (distd)
Nasri v Mesah [1971] 1 MLJ 32, FC (refd)
Onestop Software Solutions (M) Sdn Bhd v Masteritec Sdn Bhd [2009] 8 MLJ 528, HC (refd)
I *Perisai Wira Sdn Bhd v Harum Minat Sdn Bhd & Ors* [2014] 10 MLJ 809; [2014] 5 CLJ 88, HC (distd)
Pertama Cabaret Nite Club Sdn Bhd v Roman Tan [1981] 1 MLJ 149, FC (refd)
Prince Jefri Bolkiah v KPMG (a firm) [1999] 1 All ER 517, HL (refd)
Quinn v Leatham [1901] AC 506 (refd)

Sabanilam Enterprise Sdn Bhd v Masenang Sdn Bhd [2020] 3 MLJ 342; [2020] 2 CLJ 833, CA (refd)
Siskina (owners of Cargo Lately Laden On Board) and others respondents and Distos Compania Naviera SA appellants [1979] AC 210, HL (refd)
Sita UK Group Holdings Ltd v Serruys and others [2009] EWHC 869, QB (refd)
Skjevesland v Geveran Trading Company Ltd [2003] EWCA Civ 1567, CA (refd)
Svenson Hair Center Sdn Bhd v Irene Chin Zee Ling [2008] 8 CLJ 386, HC (refd)
Syarikat Seri Padu Sdn Bhd v Intan Enterprise Sdn Bhd [1982] 2 MLJ 17, FC (refd)
Tay Loong Kee Implex Pte Ltd v Tan Beng Huwah (trading as Sin Kwang Wah) [2000] 1 SLR(R) 786, CA (refd)
The Siskina [1979] AC 210, HL (distd)
Tong Kim Soo v Tirai Prospektif Sdn Bhd [2019] MLJU 946; [2020] 3 CLJ 353; [2019] 1 LNS 1310, CA (refd)
United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin [2001] 1 MLJ 561; [2001] 2 CLJ 31, CA (refd)
Vethanayagam v Karuppiah [1968] 1 MLJ 283; [1968] 1 LNS 166 (not folld)
Wong Wai Hong v Mohamed Ariff s/o Kader Mohiadeen [2018] MLJU 1293; [2018] 1 LNS 1495, HC (distd)

Legislation referred to

Arbitration Act 2005 s 11(1), (1)(a), (1)(b), (1)(c), (3)
Rules of Court 2012 O 1A, O 2, O 14A, O 15 r 6, O 18 r 19, O 29, O 29 r 1(1), 1(2), O 32 r 6
Rules of the High Court 1980
Specific Reliefs Act 1950 ss 4, 15, 51

Raspreet Kaur Sidhu (Ras & Co) for the plaintiff
Ravichandaran Selliah (Mohd Khairul Azri bin Mohd Badroldin with him) (S Ravichandaran & Anuar) for the respondent.

Tee Geok Hock JC:

INTRODUCTION AND BACKGROUND

[1] The plaintiff was appointed by the defendant in 2017 for the execution of the off-street and on-street car park operations for the whole of Putrajaya using the payment system and electronic system of Parkbyphone.

[2] The appointment was stipulated to be for an initial period of three years, with an optional extension clause for a further two years. The exact words on cl 2B(i)(d) and 2(B)(i)(e) of the contract provides as follows:

> d) Tempoh Pelantikan ini adalah selama tiga (3) tahun dengan opsyen lanjutan selama dua (2) tahun dengan menggunakan terma dan syarat yang sama seperti yang terkandung di dalam surat ini ...
>
> e) Tempoh lanjutan tamat tempoh lima (5) tahun pertama boleh dilaksanakan dengan tempoh serta terma dan syarat yang sama setelah mendapat persetujuan bersama di antara pihak PAPTT dan DTSB.

(exh 'R1' to plaintiff's affidavit in support, encl 4).

[3] By its letter dated 2 January 2020, the plaintiff notified the defendant that the defendant will continue with the appointment until year 2022, ie two years after the first term of three years. Exhibit R3 to plaintiff's affidavit in support: encl 4.

[4] On or about 13 January 2020 the defendant served its letter dated 3 January 2020 on the plaintiff stating as follows:

> RE: NOTICE OF EXPIRY OF APPOINTMENT
>
> We refer to Digital Tempo Sdn Bhd's appointment as provider of the parking system known as Putrajaya Parkbyphone for a three (3) year term commencing 6th February 2017 pursuant to our letter reference PAPTTIKEWIKONTRAKl46 JiI.1(4) dated 1dh July, 2017.
>
> We wish to advise that we will not be exercising the option to extend the appointment and as such it will terminate on 5th February, 2017. Our decision is based on issues and incidences encountered during your term of appointment which, among others, included recurring and persistent customer complaints regarding the efficacy of your system at entry and exit points.
>
> We thank you for your services and look forward to your kind cooperation in a smooth handover of the parking sites on the above termination date.

(exh 'R2' to encl 4: plaintiff's affidavit in support).

[5] By the plaintiff's solicitor's letter dated 24 January 2020 (exh 'R7' to plaintiff's affidavit in support, encl 4), the plaintiff asked the defendant to 'cease and desist letter for pre-termination of contract', and took the position that the defendant's letter dated 3 January 2020 constituted premature termination of the contract. The plaintiff through this letter also gave notice of intention to commence legal proceedings for premature and wrongful termination. On behalf of the plaintiff, the solicitors also stated as follows:

> We have our client's instructions to state that paragraph 2(B)(i)(d) of your letter of appointment dated 10th July 2017 does not state that the option to extend the contract is to be exercised by your company. As such, our client has rightfully exercised the said option in their letter dated 02nd January 2020.

The plaintiff also asked the defendant to withdraw the letter dated 3 January 2020 and to honour the extended period of two years.

[6] In reply thereto, the defendant sent its letter dated 20 January 2020 to the plaintiff in the following terms:

> RE: Your Letter Reference RKSI193812020 Dated 24 January 2020
>
> We refer to the above letter that you wrote to us. We should appreciate if you would kindly advise your Client that our decision to not extend your Client's appointment beyond the stated period of appointment of three (3) years (refer Clause (A)(d) of the SURAT TAWARAN DAN PELANTIKAN dated 10 July 2017) is firm. We look forward to smooth and cooperative handover by your Client of the parking sites and a speedy and clean disengagement and removal of any assets belonging to your Client from the sites, if any. We shall not be responsible nor liable for any subsequent loss of or damage to any of your Client's assets should your Client so fail to properly perform the process of disengagement and removal of their assets as herewith requested. Thank you.

(exh 'RK1' to the plaintiff's supplementary affidavit in encl 7).

[7] As the defendant still wanted to take steps to take over the possession and operation of the car parking areas, the plaintiff commenced this suit on or about 30 January 2020 praying, inter alia, for: (a) injunction to restrain the defendant or its agents from evicting the plaintiff or removing the plaintiff's systems at the car parking areas or from collecting any parking reserves therefrom; (b) declaration that the contract was prematurely and wrongfully terminated by the defendant by its letter dated 3 January 2020; and (c) damages and other reliefs.

[8] By ex parte notice of application dated 3 January 2020 (encl 3) supported by the plaintiff's affidavit in support affirmed on 30 January 2020 (encl 4) coupled with a certificate of urgency, the plaintiff applied for an ex parte interim injunction pending the trial and final disposal of the suit to restrain the defendant or its agents from expelling the plaintiff or the systems equipment from the car parking areas, and to restrain the defendant or its agents from hindering the plaintiff's operations at the said car parking areas.

[9] After having read the cause papers and having heard the submissions of the plaintiff's counsel, this court on 4 February 2020 granted an ex parte interim injunction pending the trial and final disposal of the suit to restrain the defendants or its agents from expelling the plaintiff or the systems equipment from the car parking areas, and to restrain the defendant or its agents from hindering the plaintiff's operations at the said car parking areas except for

Kompleks E1, and that costs be costs in the cause. Inter partes hearing of encl 3 was fixed for 21 February 2020.

[10] On 21 February 2020, the parties had not exhausted the exchange of affidavits and the defendant's counsel asked for another date to exhaust the exchange of affidavits and to file written submission. This court adjourned the inter partes hearing to 19 March 2020 and granted an interim injunction on the same terms as the ex parte interim injunction to preserve the status quo pending the disposal of the matter.

[11] With the onset of Covid-19 lockdown as from 18 March 2020, this court extended the ad interim order to 13 April 2020 and then to the subsequent date of hearing of encl 3 inter partes.

[12] By notice of application filed on 12 February 2020 (encl 12) supported by the defendant's affidavit in support affirmed on 12 February 2020 (encl 13), the defendant applied to set aside the ex parte injunction dated 4 February 2020. Exchange of affidavits in connection with this application took place.

[13] On 19 February 2020 the defendant also filed an application under O 14A of the Rules of Court 2012 for the determination of the following two questions of law to dispose of this suit without a full trial:

(a) Sama ada tempoh pelantikan Plaintif sebagai operator untuk tempoh tiga (3) tahun bermula daripada Tarikh pelantikan Plaintif iaitu pada 6 Februari 2017 seperti di dalam klausa 2(8)(i)(a) Surat Tawaran dan Pelantikan bertarikh 10.7.2017 ataupun daripada tarikh permulaan operasi oleh Plaintif sebagai operator.

Or in English, Whether the duration of appointment of the plaintiff as operator for three (3) years commenced from the date of appointing the plaintiff, viz. 6 February 2017 as stated in clause 2(B)(i)(a) of the Letter of Offer and Appointment dated 10.7.2017, or from the date of commencement of operations by the plaintiff as operator?

(b) Sama ada ianya adalah hak mutlak Plaintif untuk melanjutkan tempoh pelantikan untuk selama 2 tahun menerusi klausa 2(8)(i)(d) Surat Tawaran dan Pelantikan bertarikh 10.7.2017 tanpa persetujuan Defendan sungguhpun Plaintif tidak memohon pelaksanaan spesifik terhadap kontrak di antara Plaintif dan Defendan menerusi Surat Tawaran bertarikh 10.7.2017 terhadap Defendan.

or in English,

Whether it was the absolute right of the plaintiff to extend the duration of appointment by two years according to clause 2(B)(i)(d) of the Letter of Offer and Appointment dated 10.7.2017 without the agreement of the defendant even though the plaintiff did not apply against the defendant

for specific performance of the contract between the plaintiff and the defendant pursuant to Letter of Offer and Appointment dated 10.7.2017.

[14] The plaintiff opposed the defendant's applications in encls 12 and 16. Affidavits were exchanged and exhausted in respect of the applications in encls 3, 12 and 16. Written submissions were also exchanged between the parties in connection with the applications in encls 3, 12 and 16.

[15] The following cause papers have been exchanged and filed in connection with encls 3 and 12:

(a) writ of summons and statement of claim dated 30 January 2020;

(b) notice of application (ex parte) dated 30 January 2020;

(c) affidavit in support (plaintiff) affirmed on 30 January 2020;

(d) additional affidavit affirmed on 31 January 2020;

(e) *notis permohonan defendan bertarikh* 11 February 2020;

(f) *afidavit defendan yang diikrarkan pada* 12 February 2020;

(g) *afidavit jawapan plaintif yang diikrarkan pada* 20 February 2020;

(h) *notis niat untuk menggunakan afidavit bertarikh* 24 February 2020;

(i) *afidavit balasan defendan yang diikrarkan pada* 27 February 2020;

(j) *notis permohonan defendan bertarikh* 19 February 2020;

(k) *afidavit sokongan defendan yang diikrarkan pada* 19 February 2020;

(l) *afidavit jawapan defendan yang diikrarkan pada* 10 March 2020; and

(m) *notis niat untuk guna afidavit bertarikh* 10 March 2020.

[16] After having read and considered the causes papers and written submissions and having heard the parties' respective counsel, this court on 28 May 2020 made the following orders:

(a) encl 12 (defendant's application to set aside ex parte interim injunction) was dismissed with costs of RM5,000;

(b) encl 3 (plaintiff's inter partes application for interim injunction) was granted on terms that:

(i) if the plaintiff either fails to proceed diligently with the hearing and trial of the main suit or defaults in paying the defendant's share of the parking proceeds, the defendant shall be at liberty to apply for discharge of this injunction order;

A (ii) the plaintiffs payments of the defendant's share of the parking proceeds shall be deemed to be without prejudice to the defendant's contention regarding the question on expiry of the contract; and

(iii) costs in the cause of the main suit.

B (c) for the first stage of encl 16 (defendant's application under O 14A for determination of two questions of law), it was held to be a suitable case for O 14A disposal, and the second stage hearing of encl 16 was fixed for 11 June 2020 while both parties were given the liberty to file supplementary witness statements, affidavits and/or submissions for the C second stage hearing, if they so wish.

[17] On 16 June 2020, this court heard further oral submissions and clarification from the parties' respective counsel on the second stage of O 14A D questions in encl 16. Judgment on the second stage of O 14A questions was reserved to 25 June 2020.

[18] On 25 June 2020, this court delivered decision on the determination of the two questions of law and made consequential or ancillary orders for E disposal of the suit upon the determination of the said questions of law.

[19] By notice of appeal dated 26 June 2020, the defendant appeals against the decisions dated 28 May 2020 on encls 3 and 12.

F ENCLOSURE 12: THE DEFENDANT'S APPLICATION TO SET ASIDE EX PARTE INTERIM INJUNCTION

[20] In the defendant's application for setting aside the ex parte interim injunction, the defendant relied on two main grounds that the plaintiff G allegedly acted mala fide in restraining the defendant from removing the plaintiff and their equipment, machines and system from the car parking areas and that the plaintiff, in failing to disclose to the court the relevant facts pertaining to the alleged expiry of the contract, did not come to the court with H clean hands. The other facts and averments of the defendant in connection with encl 12 application are for the purposes of or ancillary to these two main grounds for applying to set aside the ex parte interim injunction.

The defendant's first ground: No reasonable cause of action due to failure to plead I *specific performance*

[21] In respect of the first main ground, the defendant contends that the plaintiff, by neglecting to expressly plead for specific performance of the

contract, has failed to plead a valid cause of action upon which the prayer for interim injunction, which cannot stand by itself, can be made ancillary thereto or be made in aid thereof.

[22] In *Siskina (owners of Cargo Lately Laden On Board) and others respondents and Distos Compania Naviera SA appellants* [1979] AC 210 at p 256 Lord Diplock stated: 'A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant ... The right to obtain an interlocutory injunction is merely ancillary. It is granted to maintain status quo pending the ascertainment by the Court of the rights of the parties ...'. The principle of *the Siskina* on interlocutory injunction was followed in *Chief Constable of Kent v V & Anor* [1983] QB 34 at p 49 to the effect that an interlocutory injunction will only issue where the applicant can show an apparent pre-existing legal or equitable right which requires protection. The principle on interlocutory injunction decided in the *Siskina* has been followed and applied by Malaysian courts in various cases including the *Beaufort International Hotels Ltd v Tanjung Aru Hotel Sdn Bhd v Wah Bee & Co Sdn Bhd* Penang High Court Suit No 866 of 1985 (unreported).

[23] In *Nasri v Mesah* [1971] 1 MLJ 32 the Federal Court held that:

> A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v Brown* (1888) 22 QBD 128 at p 131.

In the recent Court of Appeal's decision in *Sabanilam Enterprise Sdn Bhd v Masenang Sdn Bhd* [2020] 3 MLJ 342; [2020] 2 CLJ 833, the Court of Appeal in the judgment delivered by Hasnah JCA (now FCJ) held as follows:

> [22] David Wong Oak Wah, J (as he then was) in *Hiap-Tain Welding v Bousted Pelita Tinjar Sdn Bhd* (formerly known as Loagan Bunut Plantations Sdn Bhd) cited the case of *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12; [1988] 1 CLJ 63 Rep; [1988] 1 CLJ 219, where Tun Salleh Abbas explained what is meant by 'cause of action': 'A cause of action' is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action. Lord Diplock in *Letang v Cooper* [1965] 1 QB 232 at p 242 defined 'a cause of action' to mean 'a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person'. In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that, first, the respondent/plaintiff has a right either at law or by statute and that, secondly, such right has been affected or prejudiced by the appellant/defendant's act.

[24] Now we turn to the plaintiff's pleadings in our present case. In the plaintiff's statement of claims (encl 2), the plaintiff pleaded among others:

A (a) the date, description and nature of the contract between the parties: see paras 3–4 thereof;

(b) the phase-by-phase implementation of the operations at various car parking areas: see para 5 thereof;

B (c) the duration of the appointment was for the original three years with option to extend for further two years pursuant to cl 2B(i)(d) and (i)(e): see para 6 thereof;

(d) the defendant knew the return on investment could not be recouped within three years and that the plaintiff's option to extend for further two years was important for the plaintiff to recoup its investment, and capital costs and operating expenses: paras 6–7 thereof;

C

(e) it was the extension beyond five years that required the mutual consent of both parties: para 8 thereof;

D

(f) in breach of the contract, the defendant by letter dated 3 January 2020 stated that the contract would expire on 5 February 2020: para 9 thereof;

(g) incomes and the distribution of incomes pursuant to the terms of the contract: para 10 thereof;

E

(h) particulars of the alleged breaches on the part of the defendant, including refusal to recognise that the plaintiff has exercised its option to extend the appointment for two years, threatening or demanding to take over the operations; arranging for a purported new company to try to take over the operations; taking over Kompleks E1 parking area: paras 12(a)–(f) thereof;

F

(i) setting out the relevant and/or material terms of the contract: paras 13–14 thereof;

G

(j) plaintiff's solicitors' letter dated 28 February 2020 urging the defendant to withdraw the termination letter dated 3 January 2020 and to recognize the plaintiff's rights to operate for two extended years pursuant to the exercise of the option: para 15;

H (k) losses and damages suffered by the plaintiff as a result of the defendant's breaches or premature termination: para 16 thereof;

(l) particulars of losses: paras 17 thereof;

(m) unless restrained by court from removing the plaintiff, the defendant would cause losses and damages to the plaintiff: para 18 thereof;

I

(n) the plaintiff's prayers for:

(i) injunction to restrain the defendant or its agents from evicting the plaintiff or removing the plaintiff's parking systems and equipment

from the car parking areas and from collecting the parking revenues therefrom;

(ii) declaration that the defendant's letter dated 3 January 2020 constituted a premature and wrongful termination of the contract;

(iii) damages for losses and damages suffered by the plaintiff including loss of parking revenues, losses due to premature termination, losses arising from the plaintiff's resultant breaches of contract with other suppliers and contractors;

(iv) exemplary and aggravated damages;

(v) alternatively, damages for loss of investment, costs of equipment and systems, costs of installation, remunerations to workers;

(vi) interests;

(vii) costs; and

(viii) other reliefs as the court may deem fit to award.

[25] In connection with encl 12, the first main ground of the defendant's application to set aside the ex parte interim injunction relates to the defendant's contention that the plaintiff's pleadings did not disclose a cause of action to which an interlocutory injunction could be made ancillary thereto. The defendant contends that the defendant must plead both declaration and specific performance before the defendant could be eligible for any grant of interlocutory injunction. In arguing so, the defendant cited the following cases:

(a) *Beufort International Hotels Ltd v Tanjung Aru Hotel Sdn Bhd* [1998] 1 CLJ 378 where the High Court stated:

> In conclusion, I find the defendants have succeeded in their application that the Court to dissolve the ex parte injunction granted on 21 December 1987. Before that the Court considered that injunction is a discretionary remedy, the granting of it is based on judicial principles. *In the case of American Cyanamid Co v Ethicon* [1975] AC 396*, the principle was before granting it the Court must discover that there are serious issues to be tried and determined. Pending the determination of these issues, the interlocutory injunction is granted to preserve the status quo of the parties,* as stated.
>
> *It is settled and trite law that the Court can only decide on matter that are pleaded before it. It is basic that it is for the plaintiffs to spell out their cause of action so that the defendants will have notice of what is being alleged against them to have the issues to be defined and thus to enable them to defend.* It is also settled law that the plaintiffs are to make suitable amendment, if necessary. It is not for the Court to formulate the plaintiff's claim or infer from the pleadings. To my mind, the relief of the action, such as declaration and specific performance, must be pleaded by the plaintiffs and it is also settled law that their omission

A can in no way be made good or supplied by affidavit evidence. (See *S & F International v Trans-con Engineering Sdn Bhd* [1985] 2 MLJ 62). In *Gold Ores Reduction* [1892] 2 QBD 14 and *National Company For Foreign Trade v Kayu Raya* [1984] 1 CLJ Rep 28 283, the Court held that the statement of claim must be complete. When judgment is given on matters that are not B pleaded, it has been held to be cause for an order of retrial. The plaintiff's writ without the required reliefs in my view was in no better position than the applicant in *Syarikat Tan Teow Poh Sdn Bhd v Wah Bee Sdn Bhd* where no writ was filed. I find merit in the argument of the defendants' Counsel that the plaintiffs should have pleaded and prayed for a declaration that the notice of C termination was invalid and also for specific performance and it is clearly settle that the interlocutory injunction is only given to maintain the status quo pending that determination.

With respect to the learned Counsel for the plaintiffs, I find, in the absence of specific prayers for the said declaration that the notice of termination was invalid D *and the management agreement subsisting and for specific performance, there is therefore absence of issues to be determined at the trial, shortly there are no serious questions to be tried.* To infer the issues and the causes of action is for the Court to formulate the claim of the plaintiffs. Since there are no issues to be tried, I find it is unjust and inconvenient that the term of the ex parte injunction should be left hanging on defendants' head indefinitely and will not serve the E purpose it should have.

As regards the plaintiffs' application for a permanent injunction, I also find merit in defence submission that it is only upon the Court having decided on those absent issues that the management agreement subsist that there can be a permanent injunction. This again very much depends on the plaintiffs' F pleading seeking that declaration. In that absence, there was no basis upon which the Court can make that order. In *Vethanayagam v Karuppiah* [1968] 1 MLJ 283; [1968] 1 LNS 166 *it was settled that a temporary injunction will not be granted where a permanent injunction cannot be obtained.*

G (b) *Wong Wai Hong v Mohd Ariff s/o Kader Mohideen* [2018] MLJU 1293; [2018] 1 LNS 1495 where the High Court referred to and followed *Beauford International Hotel Ltd* case and stated:

[21] The plaintiff contends he is not questioning the validity of the MoU but the repudiation of MoU by the defendant. *The defendant did not plead that the* H *plaintiff's termination was null and void. The defendant also did not claim for specific performance.*

...

[49] *In respect of the Balance Purchase Price the plaintiff contends that the defendant did not plead specific performance for the transfer of the defendant's* I *Share and the payment of the balance RM267,000. The SCJ at paragraph 130 of the Alasan Penghakiman acknowledged the defendant did not seek specific performance*. However the SCJ allowed the defendant's claim for the sum RM267,000 on the ground that the plaintiff had failed to prove that the defendant failed to perform his obligation under the MoU.

[50] *The issue here is whether the lower court erred in allowing the claim by the defendant for the sum RM267,000 when the defendant did not specifically plead specific performance.*

[51] *It is trite law the parties are bound by their pleading and it is obvious the defendant failed to plead specific performance. In this respect reference is made to the case of Beaufort International Hotels Ltd v Tanjong Aru Hotel Sdn Bhd* [1988] 2 MLJ 638; [1988] 1 CLJ Rep 378; [1988] 2 CLJ 638 *where the court dealt with the plaintiff's writ which did not specifically pleaded declaratory relief and specific performance*. The learned judge held as follows:

> It is settled and trite law that the court can only decide on matter that are pleaded before it. It is basic that it is for the plaintiffs to spell out their cause of action so that the defendants will have notice of what is being alleged against them to have the issues to be defined and thus to enable them to defend. It is also settled law that the plaintiffs are to make suitable amendment, if necessary. It is not for the court to formulate the plaintiffs' claim or infer from the pleadings. To my mind, the relief of the action, such as declaration and specific performance, must be pleaded by the plaintiffs and it is also settled law that their omission can in no way be made good or supplied by affidavit evidence. (See *S & F International v Trans-con Engineering Sdn Bhd* [1985] 2 MLJ 62; [1985] CLJ Rep 280; [1985] 2 CLJ 228). In *Gold Ores Reduction* [1892] 2 QBD 14 and *National Company For Foreign Trade v Kayu Raya* [1984] 1 CLJ Rep 283 283, the court held that the statement of claim must be complete. When judgment is given on matters that are not pleaded, it has been held to be cause for an order of retrial. The plaintiffs' writ without pleading the require reliefs in my view was in no better position than the applicant in *Syarikat Tan Teow Poh Sdn Bhd v Wah Bee Sdn Bhd* where no writ was filed. I find merit in the argument of the defendants' counsel that the plaintiffs should have pleaded and prayed for a declaration that the notice of termination was invalid and also for specific performance and it is clearly settled that the interlocutory injunction is only given to maintain the status quo pending that determination. With respect to the learned counsel for the plaintiffs, I find, in the absence of specific prayers for the said declaration that the notice of termination was invalid and the management agreement subsisting and for specific performance, there is therefore absence of issues to be determined at the trial, shortly there are no serious questions to be tried ...

[52] *Accordingly the defendant ought to have pleaded for specific performance as the basis of his counter claim against the plaintiff. On this ground alone the defendant's claim for the balance of the purchase price ought to be dismissed.*

(c) *NZ New Image Sdn Bhd v Loh Yok Liang* [2016] MLJU 1768; [2016] 9 CLJ 474 where the Court of Appeal held that as the plaintiff only pleaded for specific performance without pleading or praying for damages in lieu of specific performance, the court will not award damages in lieu of specific performance in favour of the plaintiff; and

(d) *Perisai Wira Sdn Bhd v Harum Minat Sdn Bhd & Ors* [2014] 10 MLJ 809; [2014] 5 CLJ 88 where the High Court held that failure to plead damages in lieu of specific performance (a substantive relief) cannot be covered or remedied by a general prayer of 'such further or other relief as the court deems just and proper'.

After citing the abovementioned case authorities, the defendant in para 44 of the defendant's written submissions argued that the plaintiff failed to plead facts and/or relief which are material ie specific performance against the letter of offer clause on option to extend the contract duration. Hence, according to the defendant's contention, the plaintiff's suit herein did not show any valid cause of action and therefore the plaintiff does not have a right to claim for damages against the defendant due to the plaintiff's own neglect. In para 45 of the defendant's written submissions, the defendant submits that this court should dismiss the plaintiff's claims against the ex parte injunction order dated 4 February 2020 in view of the plaintiff's lack of valid cause of action against the defendant.

[26] In the first place, I find the defendant's fist ground of application in encl 12 to have a tendency to confuse and probably a mixing up between summary striking out of action under O 18 r 19, setting aside an ex parte interim injunction under O 29 and disposal of action on a preliminary question under O 32 r 6 of the Rules of Court 2012. Although prayer (a) in encl 12 refers to O 32 r 6, the procedure under O 32 r 6 is a two-stage procedure comprising of:

(a) first stage: applying for the court's leave or ruling that the suit be disposed of on a preliminary question (be it question of law, question of fact or question of mixed law and fact) as framed by the applicant; and

(b) second stage: hearing and determination on the preliminary question (including, where necessary, a viva voce trial for factual issues relevant to the preliminary question as well as determination of any relevant question of law) and making of orders consequential upon such determination on the preliminary question.

The two-stage procedure has to be followed in order to ensure the principles of natural justice are complied with so that the respondent in such application has the reasonable opportunity to oppose the application procedurally at the first stage and also to address the court on the merits of the preliminary question at the second stage including, where appropriate, a short trial on any dispute of relevant act. It is improper and prejudicial to the respondent if an application were allowed to merge the two stages into one stage and persuade the court to hastily strike out an action without trial by such irregular embarkation upon a decision on the preliminary question in a one-stage application. In our present case, the defendant has not followed the requisite procedure on O 32 r 6 determination. As such I hold that the defendant's application under O 32 r 6

to summarily dismiss the suit merged or combined with an application to set aside an ex parte interim injunction is a defective application which should not be entertained by this court.

[27] Be that as it may, this court has also proceeded to consider the defendant's application under O 32 r 6 on the merits. Even when the first ground of the encl 12 application was considered on the merits, I also did not find any valid and sufficient basis for allowing the defendant's said application. In my considered view, the plaintiff's statement of claim has pleaded sufficient facts and materials which disclose a reasonable cause of action. The contract clearly has an option clause on extension of two years: see cl 2B(1)(d) and (1)(e). The plaintiff has also pleaded, among others, that in spite of the plaintiff's exercise of the option to extend for two years, the defendant has threatened to evict the plaintiff and remove the plaintiff's equipment and system from the car parking areas before the expiry of the extended two years. The affidavits and the exhibits also disclose facts sufficient to found a reasonable cause of action for injunction, declaration and damages. As such, there were serious arguable or triable issues regarding the plaintiff's claims. By making an application under O 14A in encl 16 for determination on two questions of law, the defendant has also recognised by conduct that the question relating to the pleaded cause of action cannot be summarily disposed of by a one-stage procedure which the defendant proposes in prayer (a) of encl 12.

[28] As regards the other aspect of the defendant's contention in connection with interim injunction as ancillary to or in aid of a cause of action, the question is whether the plaintiff has pleaded 'the entire set of facts that gives rise to an enforceable claim' or 'every fact which if traversed, the plaintiff must prove in order to obtain judgment': see the meaning of 'cause of action' explained in *Nasri v Mesah* [1971] 1 MLJ 32 (FC) and in *Sabanilam Enterprise Sdn Bhd v Masenang Sdn Bhd* [2020] 3 MLJ 342; [2020] 2 CLJ 833.

[29] In essence, the plaintiff's claims for which the plaintiff seeks judgment are contained in the plaintiff's prayers for injunction to restrain the defendant from evicting the plaintiff or removing the plaintiff's equipment and systems from the car parking areas in breach of the contract, for declaration that the defendant's letter dated 3 January 2020 constituted premature and wrongful termination of the contract, and for damages.

[30] Section 4 of the Specific Relief Act 1950 provides as follows:

> 4 Specific relief is given —
>
> (a) ...
>
> (b) ...

A (c) by preventing a party from doing that which he is under an obligation not to do;

(d) by determining and declaring the rights of parties otherwise than by an award of compensation, ...

B O 15 r 6 of the Rules of Court 2012 *provides for declaration in the following words:*

41 Discretion of court as to declaration of status or right

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the C character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief that a mere declaration or title, omits to do so.

D Explanation — A trustee of property is a 'property is a 'person interested to deny' a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee.

ILLUSTRATIONS

E (a) A bequeaths his property to B, C and D, 'to be equally divided amongst all and each of them, if living at the time of my death, then amongst their surviving children'. No such children are in existence. In a suit against A's executor, the court may declare whether B, C and D took the property absolutely or only for their lives, and it may also declare the interests of the children before their rights are vested.

F (b) A covenants that, if he should at any time be entitled to property exceeding RM100,000, he will settle it upon certain trusts. Before any such property accrues, or any persons entitled under the trusts are ascertained, he institutes a suit to obtain a declaration that the covenant is void for uncertainty. The court may make the declaration.

G (c) *A is in possession of certain property. B, alleging that he is the owner of the property, requires A to deliver it to him. A may obtain a declaration of his right to hold the property.*

(d) A bequeaths property to B for his life, with remainder to B's wife and her children, if any, by B, but, if B die without any wife or children to C, B has H a putative wife, D, and children, but C denies that B and D were ever lawfully married; D and her children may, in B's lifetime, institute a suit against C and obtain therein a declaration that they are truly the wife and children of B.

42 Effect of declaration

I A declaration made under this Chapter is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, those parties would be trustees.

50 Preventive relief how granted

Preventive relief is granted at the discretion of the court by injunction, temporary or perpetual.

51 Temporary and perpetual injunctions

(1) *Temporary injunctions* are such as are to continue until a specified time, or until the further order of the court. *They may be granted at any period of a suit, and are regulated by the law relating to civil procedure.*

(2) A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined form the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

CHAPTER X

OF PERPETUAL INJUNCTIONS

52 Perpetual injunction when granted

(1) Subject to the other provisions contained in, or referred to by, this Chapter*, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant,* whether expressly or by implication.

(2) When such an obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II.

(3) *When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction* in the following case, namely:

(a) where the defendant is trustee of the property for the plaintiff;

(b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(c) where the invasion is such that pecuniary compensation would not afford adequate relief;

(d) where it is probable that pecuniary compensation cannot be got for the invasion; and

(e) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

Explanation — For the purpose of this section a trade-mark is property.

(a) A lets certain land to B, and B contracts not to dig sand or gravel thereout. A may sue for an injunction to restrain B from digging in violation of his contract.

[31] In light of the above-mentioned statutory provisions, the plaintiff's prayer for injunction, declaration and damages in the statement of claims are causes of action recognised by the laws. Our Specific Relief Act 1950 also contains provisions on specific performance and, insofar as the recognition as valid causes of action are concerned, the Act does not make a difference between the various specific reliefs provided in the Act. This is further

reinforced by O 15 r 16 of our Rules of Court 2012 which provides that 'No action or other proceeding shall be open to objection merely on the ground that a declaratory judgment or order is ought thereby, and the court may make binding declarations of rights whether or not consequential relief is or could be claimed' — a tacit statutory recognition that a claim for declaration on its own is a valid cause of action.

[32] For the cause of action in injunction, the plaintiff has pleaded the existence of asserted rights under the contract, the terms of the contract and the act or threat of committing an act contrary to the asserted rights of the plaintiff, and as such the material facts necessary for the cause of action in injunction have been pleaded.

[33] For the cause of action in declaration, the plaintiff has pleaded the existence of the contract, the terms of the contract on option to extend for two years, the defendant's refusal to recognise such right of extension the defendant's letter dated 3 January 2020, and the defendant's preparatory acts or thereat of infringing the operational rights for the extended two years. As such, material facts necessary for a cause of action in declaration have been pleaded.

[34] In the premises, I find and conclude that the plaintiff has adequately pleaded the causes of action, and that an interlocutory injunction in aid of or ancillary to the pleaded causes of action may be granted.

[35] The case of *NZ New Image Sdn Bhd* and *Perisai Wira* can be distinguished on the facts. In those two cases, the court held that where a plaintiff does not expressly plead for 'damages in lieu of specific performance', the court cannot award to the plaintiff damages in lieu of specific performance. It goes without saying that where a litigant does not plead a particular cause of action or relief, it would be contrary to the settled principles of pleadings for the court to grant the litigant damages in lieu of that particular cause of action or relief. However, where a litigant does not claim for any damages in lieu of a particular cause of action or relief, the law should not insist or compel the litigant to plead that particular cause of action or relief or else penalize the litigant with the dismissal of the other causes of action or reliefs which the litigant has expressly pleaded. In our present suit, the plaintiff does not claim for any damages in lieu of specific performance. As such, the question of granting any damages in lieu of specific damages does not arise at all, and the plaintiff cannot be penalised for not pleading specific performance.

[36] Consideration of the plaintiff's argument on interlocutory injunction as supposedly premised upon substantive prayers for *declaration plus specific performance* would require a more detailed analysis. (Emphasis added.)

[37] In arguing that there must be pleaded claims for declaration as well as specific performance before the court can consider granting an interlocutory injunction, the defendant cited the cases of *Beaufort International Hotel Ltd* and *Wong Wai Hong*. As *Wong Wai Hong*'s case in this aspect has merely followed *Beaufort International Hotel Ltd* case, it is sufficient for this exercise to focus on an analysis and scrutiny of the dicta in *Beaufort International Hotel Ltd* case.

[38] At the outset it must be emphasised that there is no statutory provision which requires that an interlocutory injunction must be preceded by plead claims for declaration plus specific performance or must be in aid of or ancillary to a substantive cause of action pending before the court. Section 15 of our Specific Reliefs Act 1950 provides that *'Temporary injunctions* are such as are to continue until a specified time, or until the further order of the court. *They may be granted at any period of a suit, and are regulated by the law relating to civil procedure*'. Order 29 r 1(1) of our Rules of Court 2012 *provides that 'An application for the grant of an injunction may be made by a party to a cause or matter before or after the trial* of the cause or matter*, whether or not a claim for the injunction was included in the party's originating process, counterclaim or third party notice, as the case may be*'. According to O 29 r 1 (1), a party who has not pleaded a claim for injunction in his originating process may be granted an interlocutory injunction, and similarly, a party who has expressly pleaded a claim for injunction in his originating process may also be granted an interlocutory injunction. It depends on the facts and circumstances of each of such cases whether or not the court's discretion ought to be exercised in granting an interlocutory injunction.

The term 'interlocutory injunction' are commonly used to describe the types of injunctive orders which are temporary in effect and are applied for as an interlocutory step during the pendency of a suit or action in the court. The terms 'interlocutory injunction' and 'interim injunction' are sometimes used interchangeably, both the terms appear in O 29 of our Rules of Court 2012, and they can be considered as types of temporary injunctions. The terms 'temporary injunctions' are defined in s 51 of our Specific Relief Act 1950 as having their effect 'until a specified time or until further order of the court'. As such the term 'temporary injunctions' are wide enough to cover Mareva injunctions which may be applied for in a separate suit in itself to restrain the dissipation of assets pending the disposal of an intended (and not pending) suit, or to injunctions granted under sub-s 11(1)(a)–(1)(c) of the Arbitration Act 2005 to preserve status quo or subject matter of arbitration pending the final outcome of an arbitration or intended arbitration (which is not pending before the court). In light of the fact that no suit is pending before the court and the application is not made as an interlocutory step in the pending suit before the court, strictly speaking such species of Mareva injunction and injunction in aid of arbitration do not fall within the description of 'interlocutory

injunctions', though they may be considered as 'interim' or 'temporary' in the sense of being temporary in pending the outcome of another matter.

[39] Lord Diplock's dictum in *The Siskina* is as follows:

> A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant ... The right to obtain an interlocutory injunction is merely ancillary ... It is granted to maintain status quo pending the ascertainment by the Court of the rights of the parties ...

[40] In analysing the judgments in those decided cases, I am mindful of the guidance of the English Law Lords that all judgments in the common law systems are to be read in the factual context of the cases in question and not in the abstract. 'Every judgment of the court must be read as governed by the facts of the case': *Quinn v Leatham* [1901] AC 506. Every case is decided on its own facts and must be read accordingly: per Viscount Simon in *Harris v DPP* [1952] 1 All ER 1044 at p 1050. 'All judgment under the common law system must be understood *secundum subjectectum materiam*: judges, in pronouncing principles, have in mind the characteristics present in the case, which characteristics may be absent in other cases': per Lord Diplock in *Mutual Life & Citizens' Assurance Company Ltd & Another v Clive Raleigh Evatt* [1971] AC 793 at p 8020-F.

[41] In *The Siskina* [1979] AC 210, the factual context was materially different from that of our present case. In *The Siskina,* the claimant did not plead any cause of action in England but merely sought an injunction against a Panamanian ship-owning company to restrain it from disposing a fund, consisting of insurance proceeds, in England. The claimant for the injunction in *The Siskina* case sued the company in a Cyprus court for damages and believed the company to have no other assets from which to meet any award of damages apart from the insurance proceeds in England. No proprietary claim was, or could have been, made by the claimant to the insurance proceeds and no cause of action in England was alleged or pleaded in the injunction action filed in England. The House of Lords held that the court could not grant interlocutory relief when the substantive proceedings were taking place abroad. The House of Lords held that English courts had no jurisdiction to grant a freezing injunction in a case in which there was no claim for substantive relief before the English courts. It was in the context of such factual context that Lord Diplock held:

> A right to obtain an interlocutory judgment is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory

injunction is merely ancillary and incidental to the pre- existing cause of action. It is granted to preserve the status quo pending the ascertainment of the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction' and 'To come within the sub-rule the injunction sought in the action must be part of the substantive relief to which plaintiff's cause of action entitles him; and the thing that it is sought to restrain the foreign defendant from doing in England must amount to an invasion of some legal or equitable right belonging to the plaintiff in this country and enforceable here by a final judgment for an injunction. 'The House of Lords also held that 'The general rule is that the jurisdiction of the English Court over persons is territorial. It is restricted to those upon whom its process can be served within the territorial limits England and Wales. To this general rule there are some exceptions. These are now to be found in Order 11 of the Rules of the Supreme Court which have statutory force by nature of section 99 of the Supreme Court of Judicature (Consolidation) Act 1925. Order 11 permits the High Court to grant leave to a plaintiff to serve it process upon a person outside the territorial limits of England and Wales in those case, but only in those cases, that are specified in sub-rules (a) to (0) of rule 1 (1) or in rule 2 ... In several of the cases specified in sub-rules (a) to (0) the jurisdiction exercisable over foreigners by the High Court is wider than that which is recognized in English law as being possessed by courts of foreign countries. These are 'exorbitant' jurisdictions which run counter to the normal rules of comity among civilized nations. For this reason it has long been held that where there is any room for doubt as to their meaning the provisions of the sub-rules are to be strictly construed in favour of the foreigners: *The Hagen* [1908J P 189, 201 per Farwell LJ and it is in my view equally well settled now that it is not permissible in any action commence by service of process on a person out of the jurisdiction to litigate any claim that does not fall within one or other of sub-rules (a) to (0). 'The purpose of a freezing order is ' ... to ensure that there will be a fund available within the jurisdictions to meet any judgment obtained by a Plaintiff in the High Court against a Defendant who does not reside within the jurisdiction and has no place of business here'. As to the 1925 Act: That sub-section, speaking as it does of interlocutory orders referred to are but ancillary. This factor has been present in all previous cases in which Mareva injunctions have been granted ... it is not present in this action.

[42] In England, the judicial development on interlocutory injunction in aid of foreign proceeding did not end in *The Siskina* case. Among others, in the recent case of *Black Swan Investment LSA v Harvest View Limited* [2010] ECSCJ No 357 the BVI High Court held that it was within its discretion to grant a 'stand alone' freezing injunction in support of foreign proceedings. Prior to *Black Swan Investment LSA v Harvest View Limited* [2010] ECSCJ No 357 it was previously thought by many that, by virtue of the English House of Lords case of *The Siskina*, that the court could not grant a freezing injunction unless the injunction was made in support of a claim which the court granting it had jurisdiction to enforce by final judgment — often referred to as a 'substantive cause of action'. However the BVI Court held that such an interpretation of *The Siskina* was incorrect and all that Lord Diplock was saying

in that case was that the High Court in England had no power to grant an injunction except in protection or assertion of some legal right which it has legal jurisdiction to enforce by final judgment, ie the existence of a substantive cause of action in the main action. In the subsequent English House of Lords case of *Channel Tunnel Group v Balfour Beatty Ltd* [1993] AC 334, the House of Lord clarified that the ratio decidendi in *The Siskina* does not preclude the English Court from granting an interlocutory injunction ancillary to claim for substantive relief to be granted by a foreign court or an arbitral body. Citing the dissenting judgment of Lord Nicholls in the Privy Council decision of *Mercedes-Benz AG v Leiduck* [1995] 3 All ER 929 it was held that since there was no reason in principle why a claimant could not enforce a foreign money judgment in the BVI Courts, there seemed no logical reason why he should not be able to make a claim for ancillary relief to a foreign award or judgment, such as freezing injunction.

[43] In Malaysia, the uncertainty and controversy in connection with the interpretation of *The Siskina* principle has been resolved decisively by the express provisions of O 29 r 1(1) of our Rules of Court 2012 which provides that an interlocutory injunction can be granted whether or not an injunction is prayed for in the main suit and also sub-s 11(1) and (3) of our Arbitration Act 2005 which provides for interim injunction in aid of an arbitration whether conducted locally or outside Malaysia.

[44] It is trite that where a plaintiff does not expressly plead a prayer for a particular specific relief in his statement of claim, the court will not grant him that specific relief which has not been pleaded: *Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd)* [2018] 2 MLJ 292; [2018] 1 CLJ 415 para [29] (FC); *Joseph Paulus Lantip v Tnio Chee Chang and another appeal* [2020] 5 MLJ 708. It also goes without saying that following this trite principle, where a plaintiff does not plead or pray for an injunction order in the main action, he cannot obtain a permanent injunction order. Flowing from this trite principle, O 29 r 1 (1) of our Rules of Court 2012 should be interpreted to mean what it clearly says, namely, an interlocutory injunction to preserve the status quo pending the disposal of the main action can be granted even in cases where a plaintiff does not seek any permanent injunction or injunctive order in the main action. In *Beaufort International Hotel* case, the High Court judge quoted and followed the following passage of another old High Court case in arriving at the conclusion as it did: 'In *Vethanayagam v Karuppiah* [1968] 1 MLJ 283; [1968] 1 LNS 166, it was settled that a temporary injunction will not be granted where a permanent injunction cannot be obtained'.

[45] In our Court of Appeal's subsequent case in *Keet Gerald Francis Noel*

John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 at pp 205–206; [1995] 1 CLJ 293 at p 305 it held that insofar as the said statement of principle on interlocutory injunction is concerned, *Vethanayagam v Karuppiah* is bad law and should no longer be followed: see p 305 para g. Coupled with the express provisions in O 29 r 1(1) of our Rules of Court 2012, it is beyond doubt that the statement from *Vethanayagam v Karuppiah* quoted and followed by *Beaufort International Hotel* case is no longer good law in Malaysia.

[46] As the basic function of an interlocutory injunction is to preserve the status quo pending the outcome of a future final decision in the main action and there is no statutory provision to dictate how this discretion on whether or not to grant interlocutory injunction in a particular case one should bear in mind the principles on exercise of discretion as propounded by the House of Lords that if there are no statutory guidelines and the appellate court lays down certain guidelines in exercise of discretion, the trial judge is not precluded from departing where special circumstances exists in a particular case: *Cookson v Knowles* [1979] AC 556 (headnote). A discretion necessarily involves a latitude of individual choice according to particular circumstances and differs from a case where decision follows *ex debito justitiae* once facts are ascertained': *Evans v Bartlam* [1937] AC 473 at p 489; *Muholland v Mitchell* [1971] AC 666 at p 675F.

[47] Analysed in the context, Lord Diplock in his judgment in *The Siskina* did not say that the cause of action must be *certain particular types or forms of causes of action* as contrasted with any other cause of action recognised by laws of the land, and Lord Diplock did not say that the cause of action, to which the interlocutory injunction is to be ancillary thereto or in aid thereof, must be certain particular types of cause of action such as declaration plus specific performance. Anyway, we have the clear provisions in O 29 r 1(1) of the Rules of Court 2012 which stipulates: 'An application for the grant of an injunction may be made by a party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in the party's originating process, counterclaim or third party notice, as the case may be'. In light of such clear statutory provisions, it is erroneous to suggest that a plaintiff must have a cause of action in permanent injunction before he can be granted an interlocutory injunction, and it is even more erroneous to suggest that a plaintiff in an action based on contract must have a cause of action in *declaration plus specific performance* before he can be granted an interlocutory injunction.

[48] The confusion in the legal circle seems to have first begun as a result of a certain passage in the judgment the High Court in *Beaufort International Hotel Ltd* case. I shall now proceed to scrutinise and analyse the judgment in *Beaufort International Hotel Ltd* case according to the guidelines given by the

House of Lords on reading of common law judgments in their factual context.

[49] The material facts in Beaufort International Hotels can be found from the following extracts from the judgment in that case:

> On 26 January 1988 I made an open Court order dissolving the ex parte interlocutory injunction I granted to the plaintiffs on 21 December 1987 on the strength of a draft writ and draft summons-in-chambers which I made returnable to 28 December 1987 and, on defendants having been duly served the Court order, I adjourned for open court argument to 26 January 1988 I said I would give reason for that decision. I do so now.
>
> Upon the plaintiffs undertaking to file a statement of claim according to the draft produced and also filing a summons-in-chambers as per the draft the Court granted on 21 December 1987 ex parte injunction in terms as follows:
>
> (a) an injunction restraining the defendants, its directors, and agents from terminating or purporting to terminate the hotel management agreement dated 16 July 1982;
>
> (b) an injunction restraining the defendants, its directors or agents from disturbing or otherwise interfering with the plaintiffs' lawful occupation of the Tanjong Aru Beach Hotel premises;
>
> (c) an injunction restraining the defendant and its officers from operating bank accounts of the Tanjong Aru Beach Hotel contrary to the said management agreement;
>
> (d) an injunction restraining the defendants and its officers from harassing or interfering with the rights and duties and obligations of the plaintiffs under the said management agreement the plaintiffs' management and operation of the Tanjong Aru Beach Hotel.
>
> *The writ and statement of claim subsequently filed contained the prayers (a) to (d) as above only but no prayers for a declaration and/or specific performance of the said agreement.* (Emphasis added.)
>
> See page 379 of the reported judgment.

[50] From the factual context of *Beaufort International Hotel Ltd* case, it is important to note that in the ex parte application for interlocutory injunction granted prior to the filing of the writ and statement of claim, the plaintiffs claimed for interlocutory injunctions for the interim preservation of status quo but in the plaintiffs' subsequent writ and statement of claim, the plaintiffs there did not plead for any substantive cause of action whatsoever but merely repeated the prayers for the same injunctive orders as prayed for in the ex parte application for interlocutory injunctions. It was in such factual context that the High Court in *Beaufort International Hotel Ltd* case held that by failing to plead any substantive cause of action in the main suit (ie in the statement of claim), the plaintiffs there contravened the dictum in *The Siskina* which required a substantive cause of action to be pleaded and filed in England before the

English courts could have the jurisdiction or power to grant an interlocutory injunction to preserve the status quo pending the disposal of the main suit. The facts in *The Siskina* and in *Beaufort International Hotel Ltd* case are materially different from the facts in our present case. In our present case, the plaintiff here has expressly pleaded and prayed for declaration of rights, injunction and damages which are causes of action recognised under the laws of Malaysia. In Malaysia we have the Specific Reliefs Act 1950 which provides for specific reliefs in the forms of declaration, injunction, specific performance, rectification, etc.

Again, following the guidelines of the House of Lords on reading the judgment in the factual context of that case, that case did not support a proposition or lay down a legal principle that the pleaded cause of action in contract must be declaration plus specific performance before the court can consider granting an interlocutory injunction in such case. This is borne out from the facts in *The Siskina* case as summarised in para 41 above.

[51] The facts in *Wong Wai Hong v Mohamed Ariff s/o Kader Mohiadeen* [2018] MLJU 1293; [2018] 1 LNS 1495, cited by the defendant in support of tis contentions, are materially different from those of our present case. The facts in *Wong Wai Hong* case are as extracted and reproduced below:

> [47] In analysing the factual matrix to determine whether there is indeed a repudiation of the MoU on the part of the defendant, this will inevitably determine one closely inter-related issue, namely, whether the plaintiff's termination of the MoU is legally right. As such it is immaterial that the defendant did not seek for a declaration that the plaintiff's termination in unlawful.
>
> Whether the defendant is entitled to the following claim —
>
> (a) RM267,000 being the Balance Purchase Price
>
> (b) Redemption Sum; and
>
> (c) Invoice Amount
>
> [48] With regards to the Redemption Sum and the Invoice Amount, the SCJ dismissed the defendant's claim as the defendant failed to prove the said claim. There was no appeal filed by the defendant against the said dismissal.
>
> [49] In respect of the Balance Purchase Price the plaintiff contends that the defendant did not plead specific performance for the transfer.
>
> [50] The issue here is whether the lower court erred in allowing the claim by the defendant for the sum of RM267,000 when the defendant did not specifically plead specific performance.
>
> [51] It is trite law the parties are bound by their pleading and it is obvious the defendant failed to plead specific performance. In this respect reference is made to the case of *Beaufort International Hotels Ltd v Tanjong Aru Hotel Sdn Bhd* [1988] 2 MLJ 638 where the court dealt with the plaintiff's writ which did not specifically pleaded declaratory relief and specific performance.

A [52] Accordingly the defendant ought to have pleaded for specific performance as the basis of his counter claim against the plaintiff. On this ground alone the defendant's claim for the balance of the purchase price ought to be dismissed. Assuming the defendant had pleaded specific performance, it is incumbent on him to satisfy the court that he was able and willing to perform his obligation under the B MoU (*Leelavathi a/p K Govindamay v Sivan a/l Subramaniam & Anor* [2015] MLJU 13). The fact that the defendant had signed transfer forms for the transfer of the defendant's Share alone is not sufficient to demonstrate the defendant's readiness and willingness to perform his obligation. This is because, to achieve the objective of the MoU, there are other documents which requires the defendant's C action.

[57] Thus the party who fails to complete his obligations under a contract may be discharged from completing the contract if his failure relate to an unimportant part of the contract and that he has substantially performed the contract and may sue for payment in respect of the substantial work done. In KP Kunch Raman's case the D court concluded the contract for works executed by the parties was an entire contract and the plaintiff was not relieved of his contractual obligation to complete the works for the defendant. However in view of the fact that the plaintiff substantially completed the works, he is entitled to claim for the works done but remain liable in damages for his partial failure to complete the works.

E [58] In the instant case the defendant is seeking for the payment of the Balance Purchase Price from the plaintiff. Essentially the defendant is seeking for the court to order the plaintiff to perform his contractual obligations under the MoU in order to give effect to the objective and intention of the parties, namely, the transfer of the defendant's Share which is still registered in the name of the defendant. As such it is not open to the defendant to rely on the doctrine of substantial performance to F claim the said payment as the said doctrine would allow the defendant to be discharged from performing his obligations under the MoU when transfer of the defendant's Share has yet to be effected. Moreover, it is the defendant's position (and as the evidence shows) that he did not breach the MoU. As such the issue of not performing an unimportant part of his contractual obligation does not arise.

G

[52] What can be gathered from the facts in *Beaufort International Hotel* case and *Wong Wai Hong* case is that on the facts and circumstances of those cases the learned judges were persuaded that the only appropriate substantive causes of action which the plaintiff therein could rely upon were declaration and H specific performance, and as the plaintiff had failed to pleaded these two appropriate substantive causes of action in the main action, the court in that case could not grant interlocutory injunction aid of the substantive cause of action in the main action according to the general principle laid down by *The Siskina* case. To me the judgment in *Wong Wai Hong* case, like the judgment in I *Beaufort International Hotel* case, cannot be interpreted as purporting to lay down a rigid rule of law that in an action based on contract a plaintiff must plead and pray for declaration plus specific performance in the main action before he can be eligible to apply for an interlocutory injunction for interim preservation of status quo pending the disposal of the main action.

[53] Any contention which interpreted the judgment in *Beaufort International Hotels* case as purportedly laying down a rigid rule that there must be pleaded cause of action in declaration plus specific performance in the main action before there can be an interlocutory injunction to restrain a breach or threatened breach of contract for preservation of status quo in the interim period would have erroneously interpreted that judgment out of its factual context.

[54] Examples of cases wherein interlocutory injunctions were granted or upheld in suits which did not plead causes of action in declaration plus specific performance include:

(a) *American Cynamid v Ethicon Ltd* [1975] AC 396;

(b) *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193; [1995] 1 CLJ 293 (COA);

(c) interlocutory injunctions to restrain an ex-employee or service provider from publishing or misusing the company's secrets and confidential information in breach of the contract of employment or contract for services pending the outcome of the trial of the main action wherein the law does not allow an order for specific performance of personal services: *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 1 All ER 517 (House of Lords, England); *Skjevesland v Geveran Trading Company Ltd* [2003] EWCA Civ 1567 (Court of Appeal, England); *Svenson Hair Center Sdn Bhd v Irene Chin Zee Ling* [2008] 8 CLJ 386 (Vincent Ng J (later JCA)); *Onestop Software Solutions (M) Sdn Bhd v Masteritec Sdn Bhd* [2009] 8 MLJ 528 (Ramly Ali J (later FCJ));

(d) interlocutory injunction to restrain a foreign singer from performing in other night clubs in breach of the contract pending the full trial of a main action wherein the court would not grant specific performance to compel the singer to carry out personal service of singing and performing at the plaintiff's premises: *Pertama Cabaret Nite Club Sdn Bhd v Roman Tan* [1981] 1 MLJ 149 (FC);

(e) interlocutory injunction to restrain the landlord from cutting off water supply and blocking off access to premises in breach of the covenants in a tenancy: *Low Kwye Ying v Can Yek Ying* [1971] 1 MLJ 151 (Sharma J); and

(f) interlocutory injunction to restrain the timber concessionaire from exploiting timber on land pending the trial of the main suit by the licensee who disputed the timber concessionaire's termination of the agreement on extracting and sale of timber: *Syarikat Seri Padu Sdn Bhd v Intan Enterprise Sdn Bhd* [1982] 2 MLJ 17 (FC).

[55] The Court of Appeal in *Keet Gerald* case held that an interlocutory injunction can be granted even in circumstances where a final injunction cannot be granted: see p 365g of the reported judgment. Although an interlocutory injunction can be granted in aid of a claim for permanent injunction, it is not necessary that all interlocutory injunctions must be in aid of claims for permanent injunction: see O 29 r 1(2) of the Rules of Court 2012 which provides that 'An application for the grant of an injunction may be made by a party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in the party's originating process, counterclaim or third party notice, as the case may be'.

[56] From the above, the principles on interlocutory injunction which can be gleaned from the decided authorities read in the factual context of the decided cases are as follows:

(a) an interlocutory injunction can be granted in aid of a claim for permanent injunction in the main suit;

(b) an interlocutory injunction can also be granted in aid of or ancillary to other causes of action claimed in the main suit;

(c) for the purpose of determining whether or not an interlocutory injunction should be granted, it is not helpful to try to differentiate between 'substantive cause of action and 'non-substantive cause of action';

(d) there is no rigid rule of law which requires that a plaintiff must plead and pray for a particular type of cause of action in the main suit before he can be eligible to be granted an interlocutory injunction for preservation of status quo;

(e) there is no rigid rule of law which requires that the plaintiff in an action based on contract must expressly plead the claims for declaration plus specific performance in the main suit before the court can consider granting an interlocutory injunction in that suit; and

(f) the court when considering an application for interlocutory injunction, should follow the principles and guidelines laid down by the Court of Appeal in *Keet Gerald* case for the exercise of discretion on interlocutory injunction without further impediments or rigid constraints unless expressly provided by a statute.

[57] In the premises, I reject the defendant's first ground of its application for setting aside the ex parte interim injunction.

[58] As I have explained earlier, as the date of hearing the ex parte application on 4 February 2020 there were serious triable issues which required further

investigation by the court and the balance of convenience was in favour of granting an ex parte interim injunction to maintain the status quo of the parties for the time being.

The defendant's second ground: Non-disclosure of material facts

[59] I shall now turn to the defendant's second ground for applying to set aside the ex parte injunction order, vis non-disclosure of material facts and the lack of bona fides.

[60] In arguing that the plaintiff has allegedly come to the court with unclean hands, the defendant cited the following passage of the Court of Appeal's judgment in *Eastern Properties Sdn Bhd v Hampstead Corporation Sdn Bhd* [2007] 6 CLJ 538 at p 547 and contended that the plaintiff, by failing to disclose the fact that the defendant has no intention to extend the contract period due to dissatisfaction with the plaintiff's performance which constituted a breach of contract and rendered the plaintiff an 'contract breaker', has not come to the court with clean hands:

> [14] It is beyond argument that equitable doctrines are not to be dealt with in a rigid fashion. They are by their very nature flexible and meant to be applied in such a fashion as produces a just result on the facts and circumstances of a given case. Bur there are certain basic threads that have been woven into the fabric of equitable doctrines through the pronouncements in the leading cases on the subject. One of these is that a supplicant who prays in aid equitable assistance must himself or herself be not guilty of equitable misconduct. This is sometimes put in the form of the maxim: He who comes to equity must come with clean hands. So, a contract breaker cannot successfully invoke the remedy of specific performance. So too, a trespasser may be unable to restrain the true owner of land from denying him access. Likewise, a tenant who is guilty of a breach of a covenant in his lease may be refused equitable relief from forfeiture. These are all but individual illustrations of the basic fabric.
>
> [15] Now apply that to the present case. Here we have a litigant which is guilty of a failure to abide by the promise it had mad. It would be contrary to all principles of equity to allow it to succeed.

[61] From the facts of our present case, I find the defendants' said argument to be erroneous and misconceived.

[62] In the first place, the defendant's letter dated 3 January 2020, the subject-matter of this suit, relates to the defendant's taking the position that the contract period would allegedly expire on 5 February 2020 and thereafter the defendant did not intend to extend the period. There is nothing in the defendant's letter dated 3 January 2020 to suggest that the defendant was dissatisfied with the plaintiff's performance or was terminating the contract

due to any breach of contract due to any breach of contract on the part of the plaintiff. In the eyes of the law, there is a distinction between termination for breach of contract and expiry of contract. As such, the plaintiff has not failed to disclose material facts here.

[63] Secondly, even if there was any non-disclosure of material facts, that by itself does not automatically disqualify the plaintiff from being granted an interim injunction or per se warrant the setting aside of an ex parte injunction order, though such non-disclosure is an important factor to be considered in the court's exercise of discretion whether to continue or discharge the interim injunction. In *Tay Loong Kee Implex Pte Ltd v Tan Beng Huwah (trading as Sin Kwang Wah)* [2000] 1 SLR(R) 786 the Singapore Court of Appeal held that once material non-disclosure was established, the court had a discretion to either: (a) discharge the interim injunction without looking into the merits, all the more where the omissions were deliberate with a view to misrepresent; (b) continue the ex parte injunction; or (c) grant a fresh injunction if all the facts were now before it. In *Sita UK Group Holdings Ltd v Serruys* [2010] EWHC 698 (QB), the English High Court faced with a material non-disclosure held that in balancing the need to observe the disciplinary process with the need to observe justice, the court's overriding concern was what was in the interest of justice, and the English High Court leaned towards the interest of justice in that case by refusing to discharge the ex parte injunction on ground of material non-disclosure, while holding that a deliberate non-disclosure aimed at manipulating an ex parte order would rarely lead to a continued or re-granted order. The English High Court expressed its displeasure with the act of non-disclosure by ordering the costs of the applications to be borne by the applicant. This approach was also adopted by Manns J in *JSC Mexdunarodmy Promyshlenniy Bank v Sergei Viktorovich Pugachev* [2014] EWHC 4336 (Chancery). In considering the balance between discipline and interest of justice, the court should bear in mind that ex parte injunctive orders are applied for in urgent cases and that the urgency of the applications often give the litigants' solicitors very short time within which to take clients' instructions and prepare the cause papers in support of the ex parte application. In addition to the practical difficulty of obtaining all the relevant or necessary instructions and preparing the cause papers within a very short time, litigants and their solicitors in cases involving very voluminous documents and lengthy complicated facts and details also face the task of deciding the extent and volume of the facts, details and documents to be included in an ex parte application so that the court is not inundated with irrelevant or immaterial documents, facts and details which have the tendency to confuse a reader or obfuscate the real or material issues at hand. On the other hand, in smooth and expeditious conduct and disposal of civil proceedings, the courts also do not encourage litigants to introduce in the proceeding excessive volumes of irrelevant or unnecessary documents which burden the courts with no meaningful and useful purpose in the proceedings. It is probably with such

practical considerations in mind that the learned judges in the above-mentioned decided cases have wisely held that non-disclosure of material fact per se does not automatically lead to discharge of an ex parte order but it gives the court a discretion, to be exercised on the facts and circumstances of each particular case, whether or not to discharge the ex parte order. To me, the court's reservation of the discretion to discharge the ex parte order where the material non-disclosure was deliberate and aimed at manipulating an ex parte order or calculated to misrepresent coupled with the adverse order as to costs are sufficient check and balance for the administration of justice while enforcing adequate discipline among litigants in ex parte applications.

[64] In Malaysia, we have dicta of courts including the following to the effect that the courts exist to carry out administration of justice and not merely to enforce discipline upon litigants:

(a) as was stated in the Court of Appeal in *Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd* [2003] 3 MLJ 321; [2003] 3 CLJ 532, and reiterated numerous times in subsequent cases, the 'courts are concerned with the dispensation of both procedural and substantive justice according to the merits of a given case';

(b) dictum of David Wong Dak Wah J (later CJSS) in *Kebing Wan & Anor v Lembaga Pembangunan Dan Lindungan Tanah & Ors* [2012] MLJU 1284; [2012] 1 LNS 1026, that the 'rules which govern procedures in court must never hamper or burden the court's constitutional duty to dispense substantive justice. Procedural rules must never become the 'master' and must remain a 'tool' helping the judge to dispense substantial justice';

(c) Kamaluddin Md Said JCA's dictum in *Tong Kim Soo v Tirai Prospektif Sdn Bhd* [2019] MLJU 946; [2020] 3 CLJ 353; [2019] 1 LNS 1310: '[4] The ROC 2012, to ensure the merits of the case or appeal is heard to attain substantive justice, have introduced a number of provisions to fortify the principles. Cases now have to be heard on merits and cannot be dismissed for non-compliance of rules unless there are exceptional reasons to do so' and after setting out the provisions of O 1A and O 2 of the Rules of Court 2012, the learned judge held: [6] In the light of O 1A and O 2 of the ROC 2012, it is not an option anymore for the courts to strike out a matter for non-compliance of the rules without giving an opportunity to the litigant to regularise the proceedings or to condone the irregularity by the fiat of the court. It is only in extremely rare cases where the non-compliance cannot be condoned at all, the court will be obliged to strike out the matter. Those are the cases where the respondent can demonstrate prejudice as well as can establish that the breach cannot be compensated by costs (see also *Kenanga Investment Bank Bhd v Swee*

A *Joo Berhad & Ors And Another Appeal* [2017] MLJU 2095; [2017] 1 LNS 2086)'.

[65] Even before the new O 1A was inserted into the then Rules of the High Court 1980, our appellate courts had held that the duty to do substantive justice outweighs procedural requirements or technicalities in the following cases:

(a) preliminary objection on a mere technicality should not be allowed to obstruct the process of giving justice to the deserving, thereby overruling the procedural technical objection: *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2001] 1 MLJ 561; [2001] 2 CLJ 31 (CA) (Ahmad Fairuz JCA (later CJ)); and

(b) 'The duty of the Federal Court, as the apex court, to ensure that justice is done far outweighs any procedural technicality preventing it from being done ... The Federal Court must decide the case in the interest of justice, to redress the wrong and uphold the right, uninhibited by the technicalities strewn in its path': *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385; [2002] 1 CLJ 645 (FC), Mohtar Abdullah FCJ.

Although these dicta was expressed in relation to non-compliance with the court rules, the same underlying policy of procedural principles and rules is, in my considered view, also applicable to non-disclosure of material facts in ex parte application.

[66] Order 1A of our Rules of Court 2012 also provides that 'the Court or a Judge shall have regard to the *overriding* interest of justice and not only to the technical non-compliance with these rules'. (Emphasis added.) With the inclusion of the phrase 'the *overriding* interest of justice' in O 1A, it is clear that in considering a balance between the interest of justice on the one hand and the discipline of compliance with court rules and of disclosure requirements on the other hand, the interest of justice should ordinarily, or in most cases, override the other competing factors unless the non- compliance or material non-disclosure 'has occasioned a substantial miscarriage of justice': see O 2 rr 2(1) and 3. In my considered view, 'a deliberate non-disclosure aimed at manipulating an ex parte order' (as stated in the English High Court's judgment in in *Sita UK Group Holdings Ltd v Serruys* [2010] EWHC 698) and non-disclosure which was 'deliberate with a view to misrepresent' are examples of situations where the non-disclosure has 'has occasioned a substantial miscarriage of justice'. There is no place in the system of administration of justice for a litigant to approach the court in an ex parte application to deliberately omit to make a material disclosure with the aim or purpose to manipulate an ex parte order or to misrepresent to the court for obtaining an ex

parte order. We also have the dicta of the court which took very serious views of the non-disclosure of material fact in an ex parte application, including dictum of Mohd Azmi SCJ in *Creative Furnishing Sdn Bhd v Wong Koi @ Wong Khoon Foh tta Syarikat Sri Jaya* [1989] 2 MLJ 153; [1989] 1 CLJ Rep 22; [1989] 2 CLJ 93 (SC) that ' ... every material representations must not be misleading, and there must not be any suppression of material facts. Further to do so at the crucial time of making the ex parte application would invariably be fatal ... ' and dictum of Richard Malanjun JCA (later CJ) in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 316; [2003] 4 CLJ 1 (FC), ' ... [33] It is trite law that in any ex parte application it is essential that there must be frank and fair disclosure of all relevant materials including points that may be unfavourable to an applicant. Failure to make full and fair disclosure ... The scope of the duty of disclosure of a party applying ex parte for injunctive relief is, in broad terms, agreed between the parties. Such an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarise his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences. He must disclose all facts which reasonably could or would be taken into account by the judge in deciding — whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed, the court may discharge the injunction even if after full enquiry, the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure ...'. To me, Mohd Azmi SCJ's dictum in *Creative Furnishing* case on misrepresentation of material facts and suppression of material facts meant the same concept or substantially the same concept as 'deliberate non-disclosure to manipulate an ex parte order' stated by the English court in *Sita UK Group Holdings Ltd v Serruys and others* [2009] EWHC 869 (QB) and 'deliberate with a view to misrepresent' stated by the Singapore Court of Appeal in Tay Loong Kee case. Read in the factual context in that case, I do not interpret Richard Malanjun JCA's dictum in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 316 as laying down any rigid and inflexible rule that wherever there is any non-disclosure of any material fact in an ex parte application, that ex parte order must certainly be discharged or set aside on ground of the non-disclosure alone. This interpretation, as I understand, is consonant with the guidance of the House of Lords regarding exercise of discretion expressed in the following words: If there are no statutory guidelines and the appellate court lays down certain guidelines in exercise of discretion, the trial judge is not precluded from departing where special circumstances exists in a particular case: *Cookson v Knowles* [1979] AC 556 (headnote),

House of Lords, England. A discretion necessarily involves a latitude of individual choice according to particular circumstances and differs from a case where decision follows *ex debito justitiae* once facets are ascertained': *Evans v Bartlam* [1937] AC 473, p 489; *Muholland v Mitchell* [1971] AC 666 at p 675 F. Those who have spent years of practice as advocates in civil litigations involving injunctions will appreciate and understand that there are times when an advocate cannot fully know or contemplate all facts which reasonably could or would be taken into account as material by the judge in deciding whether to grant the ex parte order, though there are *many facts* which an advocate knows or contemplates as material to a judge. (Emphasis added.) Not all judges would consider the materiality or immateriality of a fact in the same manner and weight, though there are many common threads in judicial decision-making process. The law reports also contain reported judgments where in administrative law cases the law court held tribunals' decisions and ministers' decisions as contrary to legal principles for having failed to take into consideration material factor or for having taken into consideration irrelevant or immaterial factors. Likewise, there are also reported judgments wherein the appellate courts reversed or altered the trial judges' exercise of discretion on ground that the trial judges have failed to consider a material fact or have considered facts which are immaterial to the exercise of discretion. At times, an appellate court's reversal of the trial judge's exercise of discretion on such ground was in turn reversed by the apex court which restores the trial judge's exercise of discretion. Such being the reality in the system of administration of justice in the Commonwealth countries including Malaysia, it is probably puzzling to litigants and advocates that the courts would expect the litigants and advocates to be able to know or contemplate, of the numerous facts that have occurred in the transaction or relationship between the parties, the full facts and every fact which the trial judge would consider as material to his/her exercise of discretion. To visit upon the litigants and advocates the rigid and invariable rule that wherever there is any non-disclosure of a material fact in an ex parte application it will certainly lead to the discharge or setting aside of an ex parte order irrespective of the substantive merits and justice of the matter is, in my respectful view, imposing too heavy a burden upon the litigants and their advocates merely for the sake of discipline at the risk of doing so at the expense of justice. To the best of my knowledge and judgment based on the decided authorities cited above, the court's reservation of the discretion to discharge the ex parte order or to refuse the continuance of the interlocutory order where the material non-disclosure was deliberately aimed at manipulating an ex parte order or calculated to misrepresent or was tantamount to intentional material misrepresentation which was misleading to the court, coupled with the adverse order as to costs, are sufficient check and balance for the administration of justice while enforcing adequate discipline among litigants and advocates in ex parte applications.

[67] On the facts and circumstances of our present case, I found that the

plaintiff have disclosed all the material facts. I also found that there was nothing in the evidence to support any allegation on any deliberate non-disclosure of any material fact with any intent to misrepresent on the part of the plaintiff in the ex parte application. At the ex parte hearing, I was clear as to the relevant and material facts in our present case and I was not under any misapprehension of any fact. Neither was there any material fact which was withheld from me and which would have made me decide otherwise than in favour of granting an ex parte interlocutory injunction.

[68] On the facts of our present case, I find that all the material facts necessary for the plaintiffs pleaded cause of action and relevant to the interim injunction have been pleaded in the statement of claim and also disclosed in the affidavit and exhibits in support of the ex parte application for interim injunction. In the circumstances, there was no failure on the plaintiff's part to disclose any material fact necessary for or relevant to the ex parte application for interim injunction.

[69] In the premises, I dismissed with costs the defendant's application in encl 12 (application for setting aside ex parte injunction order).

ENCLOSURE 3: INTER PARTES INTERIM INJUNCTION

[70] There is no disagreement between the parties regarding the court's role and process in considering and deciding on an application for interlocutory injunction.

[71] It is settled law that the court's role and process in considering and deciding on an application for interlocutory injunction are as laid down by our Court of Appeal in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 at pp 206–207; [1995] 1 CLJ 293 at pp 305–306 in the following words:

> To summarise, a Judge hearing an application for interlocutory injunction should undertake an inquiry along the following lines:
>
> first, he must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issue raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of Counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry.
>
> second, having found that an issue has been disclosed that requires further

investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, inter alia, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where he injustice to the plaintiff is so manifest that the Judge would be entitled to dispense with the usual undertaking as to damages (see: *Cheng Hang Guan v Perumahan Farlim (Penang) Sdn Bhd* [1988] 3 MLJ 90). Apart from such cases, the Judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee;

thirdly, the Judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130 and applied in Cheng Hang Guan. It is a judicial discretion capable of correction on appeal. Accordingly, the Judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate case should, be taken into account. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

GROUNDS OF JUDGMENT

Serious triable issues

[72] From the pleadings and the affidavits filed and exchanged between the parties, the issues that arise include:

(a) whether the commencement date of the contract period under the letter of appointment was 6 February 2017 or the various dates of commencement of operations at the various car parking areas;

(b) whether the plaintiff has the right to opt for extension of contract or two years without the consent of the defendant;

(c) whether the contract has expired on 5 February 2020 (as contended by the defendant) or has been validly extended for two years until 5 February 2022 (as contended by the plaintiff); and

(d) whether the defendant was correct in taking the position as it did in its letter dated 3 January 2020 that the contract expired on 5 February 2020.

[73] The letter of appointment contained, inter alia, the following clauses:

(B) TEMPOH PELANTIKAN

(i) TEMPOH PELANTIKAN

Tempoh Pelantikan DTSB adalah berkuatkuasa dari *6 Februari 2017;* merujuk kepada terma dan syarat seperti yang terkandung di dalam surat bertarikh 31 Januari 2017 (Rujukan PAPTT/KEW/KONTRAKl46 Jil 1(2)) yang dikeluarkan oleh PAPTT *(Lampiran 1)* di mana sistem yang digunakan adalah Sistem Putrajajaya Park by phone sahaja; dan

...

Tempoh Pelantikan ini adalah selama tiga (3) tahun dengan opsyen tempoh lanjutan selama dua (2) tahun dengan menggunakan terma dan syarat yang sama seperti yang terkandung di dalam surat ini; dan

Tempoh lanjutan selepas tamat tempoh lima (5) tahun pertama boleh dilaksanakan dengan tempoh serta terma dan syarat yang sama setelah mendapat persetujuan bersama di antara pihak PAPTT dan DTSB.

[74] By the plaintiffs letter dated 2 January 2020 (exh R3 to the plaintiffs affidavit in support), the plaintiff confirmed in writing that the plaintiff would continue the appointment pursuant to cl B(i)(d) of the letter of appointment. By the plaintiff's solicitors letter dated 24 January 2020 (exh R7) the plaintiff reiterated that the plaintiff has rightfully exercised the option to extend for two years pursuant to cl 2(8)(i)(d) of the letter of appointment.

[75] On the other hand, the defendant by its letter dated 3 January 2020 (exh 'R4') intituled 'NOTICE OF EXPIRY OF APPOINTMENT' took the position that the appointment would expire on 5 February 2020 and that the defendant would not be exercising the option to extend the appoint.

[76] By encl 16, the defendant also applied under O 14A of the Rules of Court 2012 for the court's determination of the following two questions of law which would dispose of the whole suit or a substantial part of the suit:

(a) Whether the duration of appointment of the plaintiff as operator for three (3) years commenced from the date of appointing the plaintiff, viz. 6 February 2017 as stated in clause 2(8)(i)(a) of the Letter of Offer and Appointment dated 10.7.2017, or from the date of commencement of operations by the plaintiff as operator?

(b) Whether it was the absolute right of the plaintiff to extend the duration of appointment by two years according to clause 2(8)(i)(d) of the Letter of

A Offer and Appointment dated 10.7.2017 without the agreement of the defendant even though the plaintiff did not apply against the defendant for specific performance of the contract between the plaintiff and the defendant pursuant to Letter of Offer and Appointment dated 10.7.2017.

B **[77]** In the circumstances of the present case, I find that the issues stated in para 59 above are serious triable issues or questions.

WHERE THE JUSTICE OF THE CASE LIES

C **[78]** In our present case, the plaintiff has invested substantial sums of money to purchase and install the parking equipment machines and systems at the various parking areas and in establishing an operation and management team for the said parking areas. Any eviction of the plaintiff and removal of the plaintiff's equipment, machines and systems from these car parking areas would render the dismantled equipment, machines and systems idling and/or becoming useless as the plaintiff had no other areas to re-install and operate these dismantled equipment, machines and systems. In addition, the plaintiff also avers that such premature eviction and removal would result in loss of investment, losses to workers, loss of reputation, loss of business credibility which the plaintiff claims are not adequately compensated by monetary compensation: see statement of claim and affidavit in support.

[79] For the defendant, it was alleged that a new contractor has been appointed to replace the plaintiff. However, no copy of the alleged new appointment letter or alleged new contract has been produced as an exhibit in the Suit. In the absence of disclosure of any copy of the alleged new appointment letter or alleged new contract, the court can only infer that no such written new appointment or contract has been issued or signed. The defendant has not adduced any evidence of any likely loss to the defendant if the status quo between the plaintiff and the defendant is preserved pending the final outcome of this suit.

[80] On the part of the plaintiff, it was also emphasised that during the course of the proceedings in this suit the plaintiff has been paying the defendant the latter's share of incomes earned from the car parking operations. This fact was not denied or disputed by the defendant. In the circumstances, there would be no substantial loss to be suffered by the defendant if an interim injunction was granted to preserve the status quo, especially when the defendant would still receive its share of the parking revenues.

[81] In our present case, it is also pertinent to note that with the defendant's application in encl 16 to have the suit disposed of by determination of two questions of law, there was no likelihood of long delay in the final disposal of

the suit. As the interim period between the grant of an interim injunction and the final disposal of the suit would be short, any harm which the defendant may conceive it would suffer by the grant of an interim injunction is likely to be minimal in the circumstances. In contrast, if not for the interim injunction, the defendant's imminent threat to forcefully dismantle and remove the plaintiff's equipment , machines and systems from the parking areas would, if implemented, inflict much greater harms, losses and prejudice to the plaintiff.

[82] In the circumstances, this court finds that the plaintiff would suffer much greater harm and injustice if the interim relief is withheld and that the balance of convenience is in favour of granting the interim injunction.

DISCRETIONARY CONSIDERATIONS

[83] This court has also borne in mind that the remedy prayed for is discretionary and is intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo.

[84] As regards the discretionary consideration of delay, I find that the plaintiff has come to the court very promptly (in fact within less than one month of the defendant's taking a contrary position in the defendant's letter dated 3 January 2020) and immediately upon the defendant's refusal to resile from its threat of forcibly taking over the operations of the car parking areas. There was no delay whatsoever on the part of the plaintiff in seeking the relief in this court.

[85] As regards the discretionary consideration on adequate alternative remedy such as monetary compensation, this court has also considered the following factors and circumstances:

(a) the defendant has not shown its financial and assets position to persuade the court of its ability and readiness to pay monetary compensation to the plaintiff for any wrongful eviction and removal if the interim injunction were refused;

(b) the plaintiff has asserted that it would also suffer loss of reputation and business credibility if forcefully evicted or removed from the car parking areas, and that these losses are irreparable and/or cannot be readily be assessed in monetary terms; and

(c) the defendant has neglected to produce sufficient evidence to convince this court that monetary compensation would be adequate for all losses, injury and/or harms which would be inflicted upon the plaintiff as a result of forcible eviction and removal.

[86] In addition, this court also takes into consideration the public interest where practicable, a temporary preservation of status quo should be made for a short period of time instead of allowing a forcible eviction and removal of equipment, machines and systems which would result in wastage of very substantial amount of money. The defendant having failed to produce any documentary proof of any new contract or likely loss vis a vis the alleged new contractor, and the plaintiff having shown that any forcible eviction and removal would likely result in rendering the dismantled equipment, machines and systems useless and/or wasted, the balance of justice during the interim period is in favour of interim preservation of status to avoid substantial wastage. A fortiori, the interim period would be short in view of the defendant's own application in encl 16 for expeditious disposal under O 14A.

[87] In the exercise of discretion, this court also finds guidance from the following passages of judgments by the House of Lords. If there are no statutory guidelines and the appellate court lays down certain guidelines in exercise of discretion, the trial judge is not precluded from departing where special circumstances exists in a particular case: *Cookson v Knowles* [1979] AC 556 (headnote), House of Lords, England. A discretion necessarily involves a latitude of individual choice according to particular circumstances and differs from a case where decision follows *ex debito justitiae* once facets are ascertained': *Evans v Bartlam* [1937] AC 473 at p 489; *Muholland v Mitchell* [1971] AC 666 at p 675F.

EXERCISE OF DISCRETION

[88] Taking all facts and circumstances into consideration, including those stated in paras 64–87 above, this court has come to the conclusion that the discretion ought to be exercised in favour of granting an interim injunction to preserve the status quo between the parties pending the final disposal of the suit.

[89] This court also formed the view that in implementing the interim injunction the plaintiff ought to pursue this suit diligently and without delay, and not to take an unfair advantage of the interim injunction by protracting the progress of the proceedings in this suit. Moreover, the defendant's right to receive its share of the parking revenues under the contract should not be compromised or prejudiced in the interim period.

[90] Accordingly, this court made an order on 28 May 2020 in the following terms:

(a) an interlocutory injunction is granted to restrain the defendant whether by itself or through its agents from evicting or removing the plaintiff

including the plaintiff's parking machines and equipment from the said car parking areas (except Kompleks E1) pending the final disposal of this suit;

(b) an interlocutory injunction is granted to restrain the defendant from preventing the plaintiff from operating at the said car parking areas (except Kompleks E1) and to restrain the third party appointed by the defendant from operating at the said car parking areas (except Kompleks E1);

(c) the interlocutory injunction orders granted on terms that:

(i) if the plaintiff either fails to proceed diligently with the hearing and trial of the main suit or defaults in paying the defendant's share of parking proceeds, the defendant shall be at liberty to apply for discharge of this interim injunction order;

(ii) the plaintiff's payments of the defendant's share of parking proceeds shall be deemed to be without prejudice to the defendant's contention regarding the questiono the expiry of the contract; and

(iii) costs of encl 3 shall be costs in the cause of the main suit.

Order accordingly.

Reported by Ashok Kumar